Petition

81-1947

Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS
CLERK

NO._____

IN THE

SUPREME COURT OF THE

UNITED STATES

_____TERM ____198_____

IN RE: M.G., A CHILD

JUAN E. CASTRO, PETITIONER

THE TEXAS DEPARTMENT
OF HUMAN RESOURCES,
RESPONDENT

ON APPEAL FROM THE
SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

JACOB G.HORNBERGER,JR.
915 Victoria Street
P. O.Box 1206
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(512) 722 1121

NO._____

IN THE

SUPREME COURT OF THE

UNITED STATES

_____TERM _____198_____

IN RE:

M. G., A CHILD

JUAN E. CASTRO, PETITIONER

THE TEXAS DEPARTMENT
OF HUMAN RESOURCES, RESPONDENT

PETITION
FOR A
WRIT OF CERTIORARI

The petitioner, Juan E. Castro, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas entered in this proceeding on December 31st, 1981 and which denied petitioner's motion for rehearing on January 27,1982.

QUESTIONS PRESENTED

1. Whether a State statute which permits the State to take a father's property as "reimbursement" for child welfare payments from the State to the mother is constitutionally valid when it fails to provide notice and hearing to the father to contest the mother's application for welfare.

2. Whether a State can constitutionally take a father's property as "reimbursement" for child welfare payments from the State to the mother without giving the father an opportunity to contest the mother's initial application for welfare.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas is reported at 625 SW2d 747 (Appendix, infra A 1-16). There was no opinion by the Texas Supreme Court.

JURISDICTION

The jurisdictions of the Court of Appeals and the Texas Supreme Court were timely invoked. The judgment of the Texas Supreme Court was entered on December 31st, 1981 by denying an application for a writ of error with the notation "no reversible error", (Appendix, infra B-17) A motion for rehearing timely filed, was overruled on January 27,1982. (Appendix,infra C -18) The jurisdiction of this court is invoked pursuant to

Title 28 USCS Sec. 1257 (3).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides in pertinent part as follows:

> "**nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Tex. Fam. Code Ann. Sec. 13.42 (a) (Vernon 1979) provides:

> " (a) In a suit in which a determination of paternity is sought, the court may provide for the managing and possessory conservatorship and support of and access to the child; except that no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established."

Tex. Hum. Res. Code Ann. Sec. 46.003 (a)(b) (Vernon 1980) provides in pertinent part:

> " (a) The filing of an application for or the receipt of financial assistance under Chapter 31 of this code constitutes an assignment to the department of any rights to support from any other person which the applicant or recipient may have in his or her own behalf or for a child for whom the applicant or recipient is claiming assistance, including the right to the amount accrued at the time the application is filed or the assistance is received. An applicant's

assignment under this section is valid only if the department approves the application. The department may distribute support payments or parts of payments received by it to the family for whom the payments are made or may use the payments to provide assistance and services to and on behalf of needy dependent children.

(b) Child support payments for the benefit of a recipient child shall be made to the department. If a court has ordered support payments to be made to an applicant for or recipient of financial assistance, the department may file notice of the assignment with the court ordering the

payments. The notice must include:

(1) a statement that the child is an applicant for or recipient of financial assistance.

(2) the name of the child and the caretaker for whom support has been ordered by the court;

(3) the style and cause number of the case in which support was ordered; and

(4) a request that the payments ordered be made to the department. "

Tex. Fam. Code Ann. Sec. 4.02 (Vernon 1979) provides:

> "Each spouse has the duty to support the other spouse, and each parent has the duty to support his or her minor child. A spouse or parent who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed."

STATEMENT OF FACTS

Petitioner, Juan E. Castro and Alma Rosa Garcia conceived a child named M. G. The parents were unmarried. The mother was employed prior to the birth of the child. Although the mother was physically and mentally able to work after the birth, the mother applied for state welfare payments. The Texas Department of Human Resources (hereinafter referred to as "the Department") granted the mother's application for welfare under Chapter 31, Aid to Families with Dependent Children. Under the terms of the statute, the Department took an assignment of the mother's claim for child support payments and brought suit to seek "reimbursement" from

Petitioner. The Department relies on its grant of welfare to the mother as the basis for its claim for "reimbursement".

The statute fails to provide for notice of the application for welfare to the person from whom "reimbursement" will be sought. The statute further fails to provide him an opportunity to appear and contest the application either at the time the application is made or later at the trial of the paternity suit. In this case neither notice of the application nor a hearing on such application was given Petitioner. To date no one knows whether the mother was actually qualified to receive welfare under the Department's own criteria. In the trial court, Petitioner contended that the

claim for "reimbursement" was actually a taking of Petitioner's property without due process of law. The trial court overruled the contention by denying Petitioner's Motion to Vacate Judgment. The Court of Appeals affirmed the decision of the trial court. The Texas Supreme Court affirmed without opinion by denying Petitioner's Application for Writ of Error with the notation "no reversible error".

REASON FOR GRANTING THE WRIT

The decisions below erroneously failed to hold that the State statute and the taking of Petitioner's property violated the due process clause of the 14th Amendment.

The 14th Amendment of the Federal Constitution declares that no state shall "deprive any person of life, liberty, or property with-

out due process of law." Due process of law is the "very essence of a scheme of ordered justice." Brock v North Carolina, 344 US 424, 428, 97 L.Ed. 456,460, 73 S.Ct. 349 (1953). In Ochoa vs Hernandez y Morales, 230 US 349, 161, 57 L.Ed. 1427, 1437, 33 S. Ct. 1033 (1913), the court stated:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to the common law before Magna Charta, was embodied in the Charter (2 Coke, Inst. 45,50), and has been recognized since the Revolution as among the safest foundations of our institu-

> tions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice of an opportunity for a hearing."
> (underlining ours)

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." In Re Gault, 387 US 1, 20, 186 L.Ed. 527, 542, 87 S. Ct. 1428 (1967).

Any significant taking of property by the State is within the purview of the due process clause. Goss v Lopez, 419 US 565, 575, 42 L.Ed.2d 725, 735, 95 S.Ct. 729 (1975). At a minimum, the due process clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Goss, supra. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Schroeder v New York, 371 US 208, 211, 9 L. Ed. 2d 255, 258-259, 83 S. Ct. 279 (1962); Mullane v Central Hanover Bank and Trust Co., 339 US 306, 314, 94 L.Ed. 865, 873, 70 S. Ct. 652 (1950). A "right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, supra at 314. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin vs Hale, 17 L.Ed. 531 (1 Wall 223, 233, 1864) When the protection of liberty and property are implicated, the right to some kind of prior hearing is paramount.

Board of Regents vs Roth, 403 US 564, 570-571, 33 L.ED2d 548, 556, 92 S. Ct. 2701 (1972).

Some courts hold that due process is satisfied when the statute in question either expressly or by implication confers notice and hearing. See 16 Am. Jur. 2d Section 827. Other courts hold that to be constitutional, the statute must specifically require notice, since in the absence of such a requirement, it will be deemed to authorize proceedings without notice. See 16 Am.Jur.2d Section 827. (underlining ours)

In Morris County Welfare Board vs Gilligan, 21 A.2d 805 (N.J.1943), the State sued a daughter's mother under an old-age assistance statute. The Court stated:

"Under R.S.44:7-19, N.J. S.A., 44:7-19, the welfare Board may bring appropriate actions, but Mrs. Vail would not have been obligated by law to contribute a sum for the assistance of her mother without notice and an opportunity to be heard. (underlining ours) (cases cited). But there was no way she could be compelled to do so, except in the manner pointed out by the statute, and that must be after reasonable notice of a hearing. (cases cited). Without reasonable notice there was no process of law whatever. Nor is appellant

aided by R.S.44:7-19 which permits the recovery of money due for assistance." Morris County Welfare Board, supra at 806.

Petitioner does not question the statutory or constitutional authority of the State to grant welfare payments to the mother of the child. However, once the State uses this grant as the basis for taking Petitioner's property, fundamental motions of due process require that Petitioner be given an opportunity to contest the grant either when it is made or later at the trial of the cause.

What the State calls "reim-

bursement" is actually the confiscation of Petitioner's property. In the absence of the grant, the State would be constitutionally prohibited from arbitrarily taking Petitioner's property. Therefore, the opportunity for Petitioner to contest the initial application for welfare is crucial. If the grant of welfare is merely a sham, the State is permitted to do what is constitutionally prohibited: arbitrarily taking Petitioner's property. Unless notice and a hearing to contest the grant of welfare is given to Petitioner, the grant of welfare easily becomes a pretense by which the State can confiscate Petitioner's property. Due process of law requires that

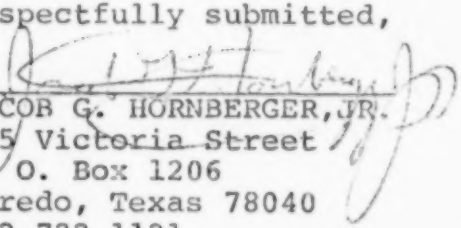
Petitioner be given notice and opportunity to contest the initial springboard from which the State claims the power to confiscate Petitioner's property. Finally, it is of no import that Petitioner is given the benefit of a trial on the issue of paternity. Unless the statutes give him the right to contest the application for welfare either at the time it is granted or at the trial, the trial court becomes an instrument of the oppression rather than a barrier to it.

CONCLUSION

The State statutes which permit the State to take a father's property as "reimbursement" for

child welfare payments from the State to the mother violate the due process clause of the 14th Amendment because the father is not given an opportunity to contest the grant of welfare. Therefore, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,



JACOB G. HORNBERGER, JR.
915 Victoria Street
P. O. Box 1206
Laredo, Texas 78040
512 722 1121
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari has this 19 day of April, 1982 been mailed to Mr.Lewis F.Boyd, Texas Department of Human Resources, P.O.Box 2960, Austin, Texas 78769, attorney for the Respondent.

Jacob G. Hornberger, Jr.

Appendix

COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT

OPINION

IN RE: M.G., A child

NO. 16619

Appeal from Webb County.

This is an appeal from an order of the trial court declaring appellant Juan E. Castro (Castro) to be the parent of M. G., a child, in a paternity suit filed by the Texas Department of Human Resources pursuant to the Human Resources Code,[1] the Family Code,[2] and Section 18-B, Article 695C,Vernon's Annotated Texas Statutes.

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1 Tex. Hum.Res.Code Ann Sec.46.001 et seq. (Vernon 1980).

2 Tex.Fam. Code Ann.Sec.13.01-13.09; 13.41-13.43 (Vernon 1980).

Castro raises the following points of error:

Point One:
The trial court erred in overruling appellant's motion to vacate judgment.

Point Two:
Chapter 31 and Chapter 46 of Title 2 of the Human Resources Code violate the due process clause of the Fourteenth Amendment because they fail to provide notice and hearing to the father to contest the mother's application for welfare.

Point Three:
The state cannot constitutionally take a father's property as "reimbursement" under Chapter 46 of Title 2 of the Human Resources Code without giving the father an opportunity to contest the mother's initial application for welfare.

Point Four:
The Court erred in denying Appellant's Motion to Modify Judgment because Appellant is not liable for attorney's fees or the costs of blood tests under Chapter 46 of the Human Resources Code.

In his motion to vacate judgment, Castro contended that because he was not notified of the initial hearing to determine financial assistance eligibility of the mother of M.G. (1) he was denied due process to contest the mother's application for financial assistance, and (2) the "reimbursement" sought by the State was an unconstitutional taking of his property. In essence these are the same contentions that Castro raises in his points of error numbers two and three. We do not agree with these contentions.

Castro was not entitled to notice of the initial hearing to determine eligibility of the mother to receive assistance pursuant to Aid to Families with

Dependent Children (AFDC). Further, Castro was not entitled to appear and contest the mother's application for financial assistance. Accordingly, we hold that Castro was not denied due process and there was no unconstitutional taking of his property.

The essence of the AFDC program is dual federal and state participation.[3] Under this scheme of cooperative federalism, the U. S. Department of Health and Human Services in the Code of Federal Regulations erected the framework of the AFDC program

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[3] See 42 U.S.C. Sec. 601 et seq. (Supp. 1981); and Tex. Hum. Res. Code Ann. Secs.11.001 et seq., 12.001 et seq., 31.001 et seq.; 46.001 et seq. (Vernon 1980).

while empowering the State of Texas to establish the eligibility requirements necessary for the operation of the state's program. The state through its administrative agency, the Department of Human Resources, has the power to formulate all rules and regulations necessary to implement the program, including all regulations to establish eligibility requirements to receive AFDC assistance. All current eligibility requirements of the State of Texas are contained in the Department Handbook published by the Department of Human Resources. We find no requirement in the Code of Federal Regulations nor in the Department Handbook that a father be notified of the estranged mother's application for financial

assistance. We also do not find a requirement that a father be present and have an opportunity to oppose the provisions of assistance to a qualified mother. Assuming that the applicant spouse, in this case the mother of M.G., was denied financial assistance under AFDC, the other spouse would still not be entitled to notice of the hearing. To give notice to Castro or to any other person of the initial hearing to determine the eligibility of the mother to receive assistance would violate sections 12.003, 21.012 and 46.006 of the Human Resources Code which prohibit the disclosure of such information.

A hearing by the Department of Human Resources to determine

financial assistance eligibility is not an "adversary proceeding" by a plaintiff against a defendant but is simply an application for benefits from a fund which the Department of Human Resources administers. An "adversary proceeding" as commonly understood presupposes a compulsory attendance of parties at a judicial or quasi-judicial proceeding and forefeiture of some right for failure to attend. May Dept. Stores v Brown, 60 F. Supp. 735, 740 (W.D.D.C. Mo. 1945). The initial hearing to determine eligibility did nothing more than establish that the mother of M. G. was entitled to AFDC assistance; it did not affect the property rights of Castro at that particular time. Therefore, the lack of

notice to Castro was not a denial of due process.

In order for there to have been an unconstitutional taking of Castro's property at the initial hearing to determine eligibility, Castro must have been deprived of some property right at that time. As stated earlier, this did not occur. In fact, Section 13,42(a) of the Texas Family Code specifically prohibits the State from extracting any money from Castro since Castro denied paternity of M.G.[4] We agree that as a direct consequence of the granting of AFDC assistance by the Department of Human Resources the mother of M.G. and the state were under a duty to initiate a judicial proceeding against Castro for involuntary legitimation. Tex.Hum.Res.

Code Sec.46.002(b)(Vernon 1980). But until such action was filed and until Castro was declared a"parent" as defined in the Code[5] Castro was under no duty to support M.G. Castro suggests that the state has sought and received "reimbursement" in the form of child support payments which must be paid to the state. Castro complains that the order of the trial court ordering

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[4] Section 13.42(a) states:

> In a suit in which a determination of paternity is sought, the court may provide for the managing and possessory conservatorship and support of and access to the child; except that no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established.

Tex.Fam.Code Ann.Sec.13.42(a) (Vernon 1979).

[5] The Texas Family Code defines a "parent" as "...a man as to whom the child is legitimate...." Tex. Fam. Code Ann. Sec. 11.01(3).

him to pay child support to the state was an unconstitutional taking of his property. The record clearly reflects that Castro enjoyed proper notice of the pleadings. He was given the right to take a blood test; he was afforded the right to an attorney; he enjoyed the right to present evidence and cross-examine witnesses; and, finally, he was afforded the right of a judicial hearing. The litigation was carried out under the letter of the law under the provisions of Section 46.003(a) Human

Resources Code,[6] and Section 4.02, Family Code,[7] and the Court was correct in ordering Castro to pay

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[6] Section 46.003(a),(b), provide in pertinent part:

> The filing of an application for or the receipt of financial assistance under Chapter 31 of this Code constitutes an assignment to the department of any rights to support from any other person which the applicant or recipient may have in his or her own behalf or for a child for whom the applicant or recipient is claiming assistance, including the right to the amount accrued at the time the application is filed or the assistance is received. An applicant's assignment under this section is valid only if the department approves the application. The department may distribute support payments or parts of payments received by it to the family for whom the payments are made or may use the payments to provide assistance and services to and on behalf of needy dependent children.
>
> Child support payments for the benefit of a recipient child shall be made to department....

TEX.HUM.RES.CODE ANN.Sec.46.003(a),(b) (Vernon 1980).

all future child support payments to the state.

Castro complains, in the remaining portion of his motion to vacate judgment, of the insufficiency of the evidence to support a finding of paternity because "such finding is based primarily on hearsay, to-wit: the blood test reports". The blood tests were admitted into evidence by the trial court without benefit of a witness and

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7 That section of the Family Code provides:

> Each spouse has the duty to support the other spouse, and each parent has the duty to support his or her minor child. A spouse or parent who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed.

TEX.FAM.CODE ANN. Sec.4.02 (Vernon 1979).

and we agree with Castro that this was in violation of the hearsay rule; however, the evidence of the blood tests was but a small portion of the entire evidence considered by the trial court to support its findings of paternity. The trial court considered, in addition to the evidence of the blood tests, evidence of periods of conception and gestation and admissions of Castro bearing on paternity. We hold that the trial court erred in admitting the blood tests, but that this was harmless error. We have considered all the evidence and, even in the absence of the evidence of the blood tests, we are satisfied that the remaining evidence

supporting the finding is factually sufficient. In fact, nowhere in the record do we find any evidence to the contrary; Castro offered none.[8]

We overrule appellant's points of error numbers one, two and three.

Finally, appellant contends that the trial court erred in granting the state attorney's fees and blood test costs under TEX. HUM.RES.CODE ANN. Sec.46.001 et seq. (Vernon 1980). Castro maintains that in absence of specific statutory provisions, the Defendant in a bastardy proceeding is not liable for the com-

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[8] Castro's attorney even admitted during oral argument before this Court that Castro was not contesting the paternity of M.G.

plainant's fees or costs. Castro stresses that, on the contrary, Title 2--Subtitle A of the Texas Family Code, limits the recovery of attorney's fees to actions brought under its provisions and does not extend to Sec. 46.001 et seq. We disagree. Section 11.18(a) of the Family Code provides:

> In any proceeding under this subtitle, the court may award costs as in other civil cases. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name.

Section 13.03(b) states:

> The court may fix a reasonable fee for each court appointed examiner and may require the fee to be paid to any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts an in the manner directed,or the court may tax all or part or none of the fee as costs in the suit.

Additionally, section 13.42(b) specifies:

> In addition to the payment authorized by Section 14.05 of this Code, the court may award reasonable attorney's fees incurred in the suit.

The trial court did not err in granting attorney's fees and costs to the Department of Human Resources and against the appellant, the natural father of M. G. Specific statutory provisions permit the taxing of costs and fees against Castro. Consequently, appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

RUDY ESQUIVEL,
ASSOCIATE JUSTICE

OPINION DELIVERED AND FILED
AUGUST 28, 1981.

CLERK'S OFFICE-SUPREME COURT

AUSTIN, TEXAS

DECEMBER 31,1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN RE M.G. A Child, No. C-817 was this day refused. No reversible error.

Very truly yours,

GARSON J. JACKSON,
CLERK

Appendix B-17

CLERK'S OFFICE

SUPREME COURT

Austin, Texas

January 27, 1982

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of C-817, IN RE: M.G., A CHILD was this day overruled.

Very truly yours,

GARSON R. JACKSON,
CLERK

Appendix C-18

Opposition

Office
ALEXANDER L. STEVAS
CLERK
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JUAN E. CASTRO,

Petitioner,

V.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for the
Fourth Supreme Judicial District of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General of Texas

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First Assistant
Attorney General

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Executive Assistant
Attorney General

PAUL R. GAVIA
Assistant Attorney General
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Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether a state statute which permits the state to take a father's property as "reimbursement" for child welfare payments from the state to the mother is constitutionally valid when it fails to provide notice and hearing to the father to contest the mother's application for welfare.

II. Whether a state can constitutionally take a father's property as "reimbursement" for child welfare payments from the state to the mother without giving the father an opportunity to contest the mother's initial application for welfare.

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LIST OF PARTIES

Juan E. Castro, Petitioner

Texas Department of Human Resources,
Named Respondent

Alma Rosa Garcia, Unnamed Respondent

Melissa Garcia, A Child, Unnamed Respondent

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No. 81-1947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JUAN E. CASTRO,

Petitioner,

V.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for the
Fourth Supreme Judicial District of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The respondent, Texas Department of Human Resources, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas. That opinion is reported at 625 S.W. 2d 747.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is reported at 625 S.W.2d 747 (Tex.Civ.App.—San Antonio 1981, writ ref'd n.r.e.) and is reproduced in the Appendix to the

Petition for Writ of Certiorari, pages A-1 to A-16. The opinion of the Texas Supreme Court is not reported and is reproduced in the Appendix to the Petition for Writ of Certiorari, page B-17.

JURISDICTION

The jurisidiction of this Court has been invoked under 28 U.S.C. §1257 (3). However, petitioner has failed to question the validity of any particular statute and has not set forth a bona fide denial of any title, right, privilege or immunity set up or claimed under the Constitution.

CONSTITUTIONAL PROVISIONS

Petitioner has attempted to set forth a claim based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, petitioner has failed to set forth any particular deprivation of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Texas Family Code:

> §13.42 Conservatorship, Support, Fees and Payments.
> (a) In a suit in which a determination of paternity is sought, the court may provide for the managing and possessory conservatorship and support of and access to the child; except that no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established.

Texas Human Resources Code:

> §46.003 Assignment of Right to Support.

(a) The filing of an application for or the receipt of financial assistance under Chapter 31 of this code constitutes an assignment to the department of any rights to support from any other person which the applicant or recipient may have in his or her own behalf or for a child for whom the applicant or recipient is claiming assistance, including the right to the amount accrued at the time the application is filed or the assistance is received. An applicant's assignment under this section is valid only if the department approves the application. The department may distribute support payments or parts of payments received by it to the family for whom the payments are made or may use the payments to provide assistance and services to and on behalf of needy dependent children.

STATEMENT OF THE CASE

On May 15, 1979, respondent filed an Original Petition in State District Court on behalf of M.G., a child, to establish her paternity and obtain child support from her natural father, Juan E. Castro. Petitioner responded by a general denial. Trial of the cause was held on June 9, 1980. Petitioner was found to be the father of M.G. and was ordered to pay child support. Thereafter, petitioner filed a motion to vacate judgment on July 24, 1980, and alleged for the first time that he was being denied property in violation of the due process clause. Petitioner never set said motion for a hearing and it was overruled by operation of law. Petitioner then appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas alleging for the first time that certain state statutes were unconstitutional.

The Court of Civil Appeals affirmed the Trial Court's action on the case (Petition App. A-1-16). Thereafter,

petitioner filed application for Writ of Error to the Texas Supreme Court which was denied with the notation "no reversible error" (Petition A, p. B-17). Petitioner has now petitioned for Writ of Certiorari in this Court.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner fails to raise a question with regard to any particular state statute in his petition.

Petitioner's basic question in his petition is whether a state statute which permits the state to take a father's property as "reimbursement" for child welfare payments from the state to the mother is constitutionally valid. Neither in the questions presented nor in the argument for granting a writ is a specific state statute attacked as being unconstitutional. Petitioner does set forth three state statutes in his listing of state statutes involved. However, none of the three statutes provides for a taking of property as a reimbursement for child welfare payments.

Only one of the three statutes listed was among those contested by the petitioner in the state courts (Pet. A-2). However, this particular statute, Texas Human Resources Code, §46.003, does not provide for reimbursement for welfare benefits. This statute merely provides for an automatic assignment of pre-existing child support rights by a recipient of Aid to Families for Dependent Children (AFDC). The property right transferred by this statute is that of the caretaker relative and child who are receiving AFDC. Petitioner has no direct interest in this transfer. Petitioner is merely a third party outside of the transaction. The transfer creates neither any new duties of the petitioner nor any automatic right of the Department for reimbursement from him.

The other two state statutes listed cannot be constitutionally challenged in this proceeding because they were not challenged in the state courts. It is axiomatic under the exhaustion doctrine that the federal claim must be fairly presented in the state courts and that one claim cannot be raised in the state courts and another in the federal courts. *Picard v. Connor,* 404 U.S. 270, 276-277 (1971).

2. Petitioner fails to identify any property denied him without due process.

Petitioner in his statement of facts alleges that respondent brought suit to seek "reimbursement" from petitioner (Petition pp. 8-9). He then claims that the "claim for reimbursement was actually a taking of petitioner's property without due process of law," (Petition p. 10). However, petitioner fails to explain how a claim in this instance amounts to a taking. Petitioner further fails to explain or identify anything that was taken. Absent a taking there is no issue for this court to determine.

3. Petitioner's argument is without merit.

The petitioner, despite all of his protestations, has been provided due process of law. Those items required by due process are that a deprivation of property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Goss v. Lopez,* 419 U.S. 565, 575 (1975); *Ochoa v. Hernandez Y. Morales,* 230 U.S. 139, 161 (1913). There was an adjudication in this case. The adjudication was a result of a trial of a paternity lawsuit. The record reflects that petitioner enjoyed proper notice of the pleadings, that there were discovery proceedings, and that petitioner was represented by an attorney (Petition A-10). Petitioner was ordered to pay child support. The constitutional necessity of a cause of action for paternity and the resul-

tant duty of the natural father to the child has previously been recognized by this court in *Gomez v. Perez,* 409 U.S. 535 (1973). The cause of action was a result of the impregnation of Alma Rosa Garcia by petitioner (Petition p. 8). Respondent did not create the cause of action; it merely brought action on it.

Petitioner alleges that the state pursued a claim against him created by the granting of public assistance to a child and her mother. However, petitioner's rights were not affected by the grant of welfare to the mother and child. The grant of AFDC was a transaction solely between the state and the mother. The state agreed to provide monetary assistance; and in turn, the mother transferred her right to receive child support from petitioner to the state. The petitioner's rights and obligations were neither increased nor decreased by this transaction. In essence, a part of his potential obligation was merely sold to the state. Petitioner has cited *Baldwin v. Hale,* 1 Wall 223 (1864), for the proposition that parties whose rights are affected are entitled to notice and hearing. However, the converse is true and applies here. Parties whose rights are not affected are not entitled to notice and a hearing.

In an attempt to get his case heard by this court, the petitioner has mislabeled the action of the state. Petitioner repeatedly refers to an action against him by the state for reimbursement. Use of the word "reimbursement" implies that respondent is seeking repayment from petitioner of past welfare monies paid to the mother of M.G. The action actually taken was to seek a child support order for payment of future child support. The distinction is that the petitioner had ample opportunity to contest the facts and present evidence with regards to the proper amount of his obligation. He was not forced to repay an amount previously determined without notice by the grant of AFDC.

The action actually taken by respondent bears little resemblance to that alleged by petitioner. There is no merit to the constitutional challenge raised in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Respondent's Brief in Opposition have on this the _____ day of May, 1982, been sent by United States Postal Service, Certified, Returned Receipt Requested, to the following:

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